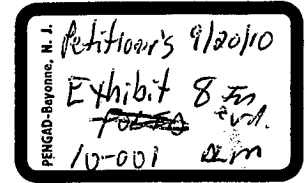


State of New Hampshire

GENERAL COURT

CONCORD

144:162



MEMORANDUM

DATE: December 9, 2009

TO: Honorable John H. Lynch, Governor
Honorable Terie Norelli, Speaker of the House
Honorable Sylvia B. Larsen, President of the Senate
Honorable Karen O. Wadsworth, House Clerk
Tammy L. Wright, Senate Clerk
Michael York, State Librarian

FROM: Senator Maggie Wood Hassan, Chair

SUBJECT: Final Report on HB 2, Chapter 144:162, Laws of 2009

Pursuant to Chapter 144:162, Laws of 2009, enclosed please find the Final Report of the Committee to Study the Organizational Structure of the Liquor Commission.

If you have any questions or comments regarding this report, please do not hesitate to contact me.

Enclosure

cc: Committee Members

REPORT OF THE COMMITTEE TO STUDY THE ORGANIZATIONAL STRUCTURE OF THE LIQUOR COMMISSION

This study was mandated by the Legislature as part of the 2009 budget process. In particular, HB 2, Chapter 144:162, 2009 requires a legislative study committee to consider two issues: (1) whether the decision in HB 2 to transfer the Liquor Commission's enforcement function to the Department of Safety on July 1, 2010, is appropriate; and (2) whether it makes sense to change the administrative structure of the Commission from one in which three full-time commissioners share authority and responsibility for the administration and performance of the Commission to one in which a single Executive Director oversees its operations.¹ In addition to these two charges, the legislature also instructed this Committee to recommend that the transfer of enforcement function not take place if the transfer would require additional appropriations or the creation of new positions; an instruction that is particularly apt in a time when financial and human resources are scarce.²

Committee Process

The Committee includes Rep. William Butynski, Rep. Daniel Eaton, Rep. David Hess, Sen. John Gallus, and Sen. Margaret Hassan. It met six times, and received testimony from numerous stakeholders, including Liquor Commissioners Mark Bodi (Chair) and Richard Simard, Chief of the Liquor Commission's Enforcement Division, members of the Commission's staff, representatives of the NH Restaurant and Lodging Association, representatives of New Futures, a non-profit advocacy group focused on reducing under-age drinking, the NH Grocers Association, the Commissioner and Assistant Commissioner of the Department of Safety, two former liquor commissioners, and a state representative among others. Additionally, the Committee received written communications from various trade groups as well as some former employees of the Commission.³

Background

During the 2009 budget process (to develop the budget for Fiscal Years 2010 and 2011) the House of Representatives included provisions in the budget that transferred the liquor enforcement function from the Commission to the Department of Safety. Meanwhile, the Senate's budget provided that the Liquor Commission could operate as an Enterprise Fund,⁴ allowing the Commission more autonomy in the way it structures and operates its finances and business functions, while still maintaining legislative oversight.

¹ The Act's specific language reads: The committee shall study the organizational structure of the liquor commission, including but not limited to having an executive director and the appropriate placement of liquor licensing and enforcement functions. (Chapter 144:162, paragraph III). This report addresses the issue of appropriate placement of enforcement and licensing functions first, as the committee spent most of its efforts focusing on this issue given the pending transfer of the enforcement division to the Department of Safety on July 1, 2010 as provided for in Chapter 144: 175, paragraph I.

² Chapter 144:175, paragraph II.

³ Minutes of the Committee's meetings are attached as Appendix A.

⁴ The term Enterprise Fund is an accounting term that describes a government fund that charges a fee to be self supporting and generally is used by governmental entities that are charged with operating in a manner similar to business enterprises with the purpose of creating revenue for the state. Enterprise Funds are also allowed to report long-term assets and liabilities on their balance sheets. New Hampshire's Lottery Commission is already such a fund.

The Senate opposed the transfer of the Commission's enforcement function while the House opposed designation of the Liquor Commission as an Enterprise Fund.

During the Budget Committee of Conference, the House and Senate compromised their respective positions with regard to the transfer of the enforcement function, providing that the transfer of enforcement would be delayed until July 1, 2010 and that, in the interim, this Committee would meet to consider the transfer more closely. This Committee was also charged with considering whether the current commission structure is still an appropriate way of operating the Commission, an issue that was discussed as the Commission's budget was being considered.

Findings and Recommendations

A. Enforcement Transfer

1. The regulated community uniformly opposes the transfer of the Commission's enforcement function to the Department of Safety. The most commonly expressed rationale for this position is that the current system works well and that efforts to improve it by a wholesale transfer to another division of state government would produce new problems or challenges. This position was bolstered by the observation that Chapter 144; 175 authorizes the transfer of only the Commission's enforcement function to the Department of Safety, leaving the licensing and education functions at the Commission.⁵ Currently the Commission integrates enforcement, licensing, and education in one cohesive unit and there is strong support for this unified approach to these duties.
2. Organizations who share the mission of reducing underage drinking and misuse of alcohol also oppose the transfer. They believe the Commission is doing a good job of controlling alcohol misuse and abuse and that part of the reason for the agency's success is that the tasks of licensing, education and enforcement are coordinated by an interdisciplinary team at the Commission. They also note the particular challenge of licensing the sellers and distributors of alcohol while also being charged with maximizing profits for the sale and distribution of alcohol in the state. They believe that the Commission's current structure lends itself well to ensuring that the regulated community is well educated and well supervised without being overburdened with too rigid a bureaucracy. In short, from their perspective, the Commission appears to be balancing its control function well with its mission of increasing revenues.
3. The Committee heard, more informally, through emails and anecdotes, that there were some occasions in which members of the regulated community felt that the Commission's enforcement efforts had been heavy-handed. However, there appeared to be some consensus among those providing public testimony that such incidents were relatively infrequent and

⁵ Chapter 144;175, paragraph 1 says that "all the functions, positions, powers, duties, responsibilities, and funding of the liquor Commission used for enforcement of alcoholic beverage laws shall be transferred to the department of safety on July 1, 2010." Meanwhile, Chapter 144;165 references a Liquor Commission without an enforcement division but with a licensing division, as do other paragraphs of Chapter 144, making clear that the legislature has authorized only the transfer of the enforcement function to the department of safety.

that the Commission had been responsive to criticisms or concerns raised about these incidents.⁶

4. The Department of Safety is neutral as to the transfer of the Commission's enforcement function, but noted that if only enforcement function were transferred, there would be some cost both in terms of additional positions needed and fees charged to the enforcement function to pay for the Department's indirect costs of administering the enforcement program. The Department also advised the Committee that it believed, as a general rule, that the transfer of an enforcement function was appropriate if and when a regulatory agency started using its enforcement power in such a way as to be indistinguishable from other public safety agencies with broader authority. The Department thus indicated its belief that regulatory agencies such as the Commission should limit their activities to enforcing the particular statutes over which they have specific jurisdiction and should rely on local and state public safety officials for the regulation of other areas.
5. It is not clear that the Commission exercises sufficient oversight over the enforcement personnel to ensure that the regulated community believes that the enforcement division shares a consistent sense of its limited, regulatory mission. The Committee also received informal suggestions that in some instances local police departments welcome the opportunity to supplement limited local forces with Commission enforcement personnel when enforcement of liquor laws overlaps with the need for other types of law enforcement action. The Commission should take steps to ensure that the enforcement division is properly supervised, contains its function to that of a regulatory authority, and guards against overly broad interpretation of its function.
6. As written and passed, Chapter 144 allows only the transfer of the enforcement function to the Department of Safety, while leaving the licensing and education functions with the Commission. The Committee believes that this division would result in a less integrated and effective regulatory system and strongly recommends against dividing these functions. Thus, even if the Committee was convinced that the enforcement function should be transferred to the Department of Safety, it would not recommend doing so without the concurrent transfers of the education and licensing functions.
7. The transfer of the enforcement function would, as currently authorized, appear to require the creation of at least some additional positions at the Commission, as individuals who currently perform enforcement duties, and would be transferred to the Department of Safety, also share licensing and education functions. While the Committee does not believe that the cost of the transfer is as high as the Commission initially projected, at least three of five Committee members believe that the Department of Safety would need an appropriation to pay for the

⁶ At least one member of the Committee believes that instances of possible abuse of authority by enforcement personnel are more frequent than reported and that the lack of public testimony about these instances results from fear among members of the regulated community that the enforcement division will use their authority to punish those who make public statements that are negative about the division or the Commission.

indirect costs of administering liquor enforcement. Thus, in accordance with Chapter 144:175, paragraph III, four of five Committee members recommend against the transfer of enforcement at this time on the grounds that it would appear to require an additional appropriation for the Department of Safety and the creation of additional positions at the Liquor Commission.⁷ The Committee will ensure that legislation to repeal the transfer is filed for the upcoming legislative session.

B. Adjudicatory Process

Although not specifically mentioned in the charge to the Committee, the issue of whether the current adjudicatory process for appeals of enforcement or licensing actions arose as part of the Committee's discussion concerning the Commission's enforcement function. The current adjudicatory process at the Commission provides no opportunity for disinterested review of appeals prior to a review by the New Hampshire Supreme Court. Currently, the Commission serves as both the prosecutor of violations and the appellate board through which the regulated community can seek relief from allegedly unwarranted enforcement actions. While members of the regulated community hesitated to publicly express displeasure with this aspect of the Commission's organization and function, the Committee believes that further exploration of the concept of a mechanism through which a designated neutral or disinterested panel could review the Commission's rulings is warranted.

C. Executive Director

1. The Committee did not have a great deal of time to explore this issue because of the need to deal more immediately with the impending transfer of the enforcement function to the Department of Safety.
2. With that proviso, the Committee thinks that the possibility of changing the Commission's organizational structure deserves further exploration. Few control states share New Hampshire's structure of a three person, full time Commission, where Commissioners with set terms share authority and responsibility. Members of the regulated community were unified in their support for the current structure on the grounds that it appeared to them to be working well. But the testimony against change in this area seemed to be based on satisfaction with the current structure rather than on misgivings about the idea of a structure headed by a single executive director.
3. Under the current structure, there appears to be no single person at the Commission who bears ultimate authority and responsibility for its performance – lines of authority and responsibility

⁷ The Committee's recommendations are based on votes of the majority, but, as noted, one Committee member, Representative Eaton, disagrees with the conclusions of this Committee with regard to the transfer of the enforcement function. Representative Eaton believes that the education, licensing, and enforcement functions should all be transferred to the Department of Safety.

are only informally established and shared by the Commissioners.⁸ And, because they enjoy state commissions, none can be replaced for failure to meet certain performance goals unless such failure is accompanied by truly derelict or criminal behavior. Such a situation – in which there is no single, accountable chief executive who serves according to set performance standards—seems potentially untenable given recent changes to the Commission which are all intended to enable it to run more like a business enterprise and to increase revenues.

D. Continued Study

The Committee recommends that a legislative study committee continue to examine the issues of: (1) whether the Commission should have an executive director rather than a full time three member commission; (2) how best to ensure impartial review of appeals of licensing and enforcement decisions; and (3) how best to ensure that the enforcement division is properly supervised, contains its function to that of a regulatory authority, and guards against overly broad interpretation of its function.

Summary

A majority of the Committee finds that a transfer of enforcement functions from the Commission to the Department of Safety is not needed or appropriate at this time. The legislature's decision to authorize only the transfer of the enforcement function is at odds with an integrated education, licensing and enforcement strategy that is working well. In addition to the inevitable disruption that such a transfer would cause – at a time of change and uncertainty--the transfer would also require an appropriation to the Department of Safety and very likely require at least a few additional positions at the Commission.

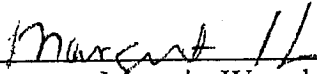
The Committee further finds that there should be an impartial review available to those who appeal licensing or enforcement actions and that the issue of whether the current system meets this need requires further study.

The Committee also finds that the executive and legislative branches should continue to explore the possibility of changing the administrative structure of the Commission so that it would be run by a single executive. This does not necessarily eliminate a role for commissioners, but it would likely make the existence of three member full-time paid commission unnecessary.

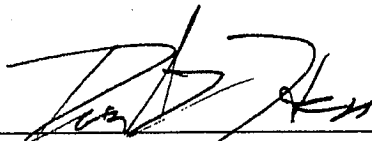
Finally, the Committee recommends that in addition to continuing to study the administrative structure of the Commission, the legislature should continue to study the most appropriate way to ensure impartial appeals of enforcement and licensing actions as well as the most appropriate way to ensure that the enforcement division is properly supervised and limited in its function.

⁸ Members of the Committee noted that historically, the Chair of the Commission has been considered to serve as the "chief executive" among commissioners who are otherwise considered equals. However, during his testimony, Chairman Bodi stated that all commissioners were, in his view, equals in terms of authority and accountability and that the only function that was specific to the chair was that of calling meetings and setting agendas for them.

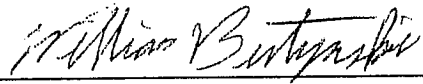
Respectfully submitted,



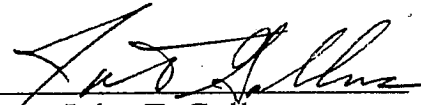
Senator Maggie Wood Hassan
Chair, District 23



Representative David Hess
Merrimack 9



Representative William Butynski
Cheshire 4



Senator John T. Gallus
District 1

Representative Daniel A. Eaton
Cheshire 2